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AUTHOR Lieberman, Myron
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ABSTRACT

The fact that public employees do not have particular rights accorded private employees may not be inequity if public employees enjoy benefits not shared by private employees. Public employees' political influence on public sector bargaining is probably the most important difference between the two sectors. Political activity pays the teacher larger dividends than it does the factory worker. Secondly, the public employer cannot avoid unionization by moving to another state. Thirdly, public employees are entitled to due process even in the absence of a collective agreement or statutory protection. Fourthly, public employees often have statutory benefits that must be bargained in the private sector. A major disadvantage of public employees relates to revenue raising and contract ratification procedures. The most glaring inequity, according to public sector unions, is the fact that most states prohibit strikes by public employees. Nevertheless, this inequity is more technical than practical. The differences between public and private bargaining are not all favorable to public employees, but most of them are, even though their practical importance varies from state to state. (Author/JG)

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PRESENTER: Myron Lieberman, Irving R. Melbo Professor of Education, University of Southern California, L.A.
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In 1962, the first significant collective bargaining contract covering teachers was negotiated in New York City. Since then, collective bargaining in education has developed nationally at an impressive pace. At present, approximately 35 states have enacted laws providing teachers with bargaining rights, and a growing majority of teachers (perhaps 60 per cent or more) work pursuant to collective bargaining contracts. Membership in teacher unions has increased enormously; simultaneously, dues therein have been increased, so that the resources available to teacher unions may even exceed five hundred million dollars annually. Since 60-80 percent of school budgets are spent for personnel, virtually every aspect of education has been affected by this dramatic shift to collectively bargained terms and conditions of employment.

During the past 15 years, collective bargaining was sometimes sold to school boards and school administrators on a "Try it, you'll like it" basis. Others simply inherited bargaining as a fixture on the educational scene, just as its absence was taken for granted in an earlier era. Regardless of how it is presented or experienced, however, there is one crucial difference between the present situation and the 1960's. Today, we have a wealth of experience on collective bargaining in education to guide us. What was advocated or oppose in the 1960's on the basis of logic or intuition or speculation or analogy can be tested today against a body of experience. Today, there is no excuse for debating whether or how collective bargaining in

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education differs from collective bargaining in the private sector. The differences are real and important, and they justify a reconsideration of certain issues which were not considered critically in the take-off period. One such issue is whether "equity" for public employees justifies or requires providing them collective bargaining rights similar if not identical to those provided private sector employees.

After all, the appeal to "equity" was the major public policy justification for teacher bargaining. Without bargaining rights, teachers, like other public employees, are allegedly second class citizens. Privately employed guards can unionize and strike; publicly employed ones cannot. Bus drivers for a privately owned company can strike; if the same routes were taken over and operated as a public utility, the drivers could not bargain or strike. Similarly, teachers in private schools can organize and bargain, those in public schools cannot.

The equity argument was reinforced by others, e.g. that government should be a model employer. Just as government loses credibility if it lags behind the private sector in eliminating racial discrimination, so it should supposedly lead, not follow, in establishing appropriate conditions of employment. Such conditions have included the right to organize and bargain collectively since 1935. State and local public employees were not covered by the National Labor Relations Act because such coverage would have been deemed an invasion of state's rights. As a result, state policies developed differently from state to state. Today, public employees allegedly object strongly to the fact that they

do not have the collective bargaining rights as are enjoyed by private sector employees.

Clearly, if public school teachers do object to this situation, their objections are not a spontaneous reaction on their part. On the contrary, they are the outcome or a massive campaign by their own leaders and organizations to convince them that they are second class citizens. Of course, if they are, the sources of their enlightenment are not so important. The question remains, however, why such a campaign was and is necessary, One hardly needed a campaign to convince blacks that they were subject to racial discrimination - why was and is one essential to convincing teachers that in the absence of bargaining rights, they are "second class citizens" who are not getting equity vis-a-vis' private sector employees?

Could one reason be that the basic argument is not a very persuasive one? For the sake of argument, let us grant that public employees ought to have "equity" with private sector employees. If equity is to be meaningful,however, it must take into account all the advantages and disadvantages of employment in the two sectors. The fact that public employees do not have particular rights accorded private sector employees may not be an inequity if there are advantages or benefits associated with public but not private employment. Everyone experienced in bargaining is aware of this. Employees who lack dental insurance are not necessarily being treated inequitably vis-a-vis' those who have it; the former may have legal and life and accident insurance not available to those who have dental insurance.

To achieve a broader perspective, let us summarize briefly some of the crucial differences between public and private sector employment, using teachers as an example of public sector employment. Clearly, one important difference is that teachers often play an important role in determining who is management. For example, teacher organizations are frequently active in school board elections. In some situations, their actual or potential influence upon the identity of school management affects every aspect of bargaining. In contrast, employees in the private sector have no legal or practical role in selecting management, and it would ordinarily be quixotic or foolish for them to try to do so.

In fact, the influence of political factors on bargaining is probably the most important difference between the two sectors, and it is a difference that is obviously advantageous to public employees. Politics may affect not only what is proposed, accepted, rejected, and modified, but the timing of concessions, the management posture toward grievances, and the extent of management support services for bargaining. Even the choice of management negotiator may be subjected to an unofficial but real teacher veto.

It is easy to underestimate the importance of teacher political influence because typically it has to be shared. The influence is more [redacted] veto power than "do" power. One should not be misled, however, by the fact that teacher backed candidates do not always support the teachers, or may even oppose them on occasion. Such situations notwithstanding, the political dimension

to public employee bargaining gives public employees significant advantages over private sector employees. In this connection, teacher opportunities to influence the choice of governor and state as well as federal legislators must also be considered. True enough, private sector employees have equal opportunities to elect state executives and legislators. The point is, however, that governors and state legislators are rarely in a position to affect the context or substance of private sector bargaining. The governor of a state has nothing to say about collective bargaining procedures for industrial employees. Such procedures are regulated by the National Labor Relations Board, a federal agency. On the other hand, the governor will frequently have a decisive role to play on whether there is to be public sector bargaining at all, and if there is, on such matters as the scope of bargaining, the nature of unfair labor practices, the relationship of bargaining to budgetary schedules, the impasse procedures, and the balance of bargaining power between the parties. In addition, they often play a crucial role in the matters subject to bargaining. For example, the governor typically is the most important single individual in the annual aid to education controversy. Since states provide almost half of public school revenues, the gubernatorial role is much more important to teachers than it is to most private sector unions. For teachers, as for other local public employees, the implications are obvious. Political activity at the state level pays the teacher a larger dividend than it does the factory worker or the farmer.

The fact that NEA and AFT are once again seeking to enact federal legislation providing bargaining rights for state and

local public employees in no way negates the foregoing analysis. Obviously, if public employee unions can achieve their goals by one legislative enactment instead of fifty, they will do so. As a matter of fact, while they are striving for state bargaining laws, they are also seeking state legislative benefits on matters normally considered subject to bargaining. I am not making any moral judgment on this inconsistency, albeit its intellectual level sometimes raises moral issues. Every group has the right to use the ballot box to advance its interests; my point is only that we should be aware of the real advantages as well as the disadvantages of public employment.

2. Another difference is that public enterprise cannot move. The public employer cannot avoid unionization by moving to another state, as can be done in some industries. Again, although the employer's ability to move, and its impact on bargaining varies from industry to industry and within industries, the inability of the public employer to relocate as a response to employee pressure is obviously advantageous to public employees. In the private sector, multi-national corporations have even resisted unionization successfully by moving certain operations from one country to another. Elsewhere the threat of doing so helps to moderate union demands in many situations. On the other hand, you cannot move the schools of Las Vegas to Mexico, or even to Reno, in order to avoid excessive demands by teacher unions in Las Vegas.

3. Public employees are entitled to certain rights of due process even in the absence of a collective agreement or statutory protection. For example, where public employees have acquired an expectancy of reemployment, they may not be fired without due process. Note that this protection is grounded in the federal constitution, not state statutory enactments. Thus public employees without bargaining rights or other statutory protections frequently have more protection against arbitrary and unjust employer action than do private sector employees with bargaining rights.

4. Public employees frequently have the benefit of an extensive system of statutory benefits which must be bargained in the private sector. In California, by statute, teachers and teacher unions have the following benefits, among others, by state law:

1. Strong protection against dismissal or suspension
2. Ten days sick leave cumulative without limit
3. Right to due process even as probationary employees
4. Substantial notice before termination
5. Layoff rights
6. Military bereavement, personal necessity, legislative, industrial accident and illness leave
7. Sweeping protections in evaluation
8. Limits on district authority to reduce benefits
9. Protection against non-certified employees doing teacher work
10. Duty-free lunch period
11. RIght to dues deduction
12. Right to prompt payment of salary
13. Right to notice of school closing
14. Protection from legal actions for action in the course of employment
15. Protection from being upbraided, insulted, or abused in the presence of pupils
16. LImits on the work day and work year

In the private sector, collective bargaining is the means of self-help to these benefits: bargaining rights were not superimposed on them. Providing bargaining rights in addition to this vast complex of statutory benefits is not equity for teachers; it is more than equity by a wide margin. In the private sector, employees would presumably have had to make various concessions to get these benefits, if they got them at all. In California and many other states, the benefits existed prior to bargaining and no employee concession was or is required to achieve them. This is an enormous advantage to the public employee.

Technically, one could argue that the statutory benefits for public employees are not an inherent difference between the public and private sectors. Theoretically, California could repeal all the statutory benefits just mentioned and the teachers could bargain from ground zero. For this reason, it may be argued that the existence of statutory benefits for teachers does not constitute an inherent advantage of public over private sector employees.

In fact, however, even the legal possibilities are not so clear. In some states, such as New York, public employee pension benefits may not constitutionally be reduced by the state. Unfortunately, the fact that they could not be reduced did not seem to lessen the generosity of the legislators, who must now grapple with the grave problem of funding public employee pension and retirement benefits which require almost one-tenth of the state's revenues.

The hollowness of the equity argument was clearly illustrated in the Crestwood, Michigan case, where the board of education

in good faith to impasse. In the private sector, the employer has the right to replace strikers under these circumstances, and considerations of equity would appear to justify a similar right for the public employer. Be that as it may, the teachers associations argued that under Michigan law, boards could fire teachers only pursuant to the causes and procedures set forth in the Michigan tenure law. These procedures would have required a board hearing for each individual teacher; the practical implications would have been to make it impossible to fire striking teachers in most districts.

By a vote of 4-3, the Michigan Supreme Court refused to support the teacher assocation position and upheld the right of the board to discharge striking teachers without having to comply with the Michigan tenure law. Elsewhere, however, school management may not be as fortunate. State bargaining legislation is typically drafted by public employee unions who are sensitive to these issues and draft legislation accordingly. Regardless, my purpose is not to criticize teacher organizations for seeking more than equity. It is simply to illustrate the fact that the appeal to equity ismerely a tactical device which has little or nothing to do with the underlying issues involve. Granted, teacher organizations could argue that they have a right to tenure protections because they lack other protections available in the private sector. In other words, teachers could argue that it is fallacious to determine whether equity exists by comparing public and private sector imployees on the basis of one isolated criterion, and urge a comprehensive view of the issue. The fact that this has not happened perhpas reveals the private perceptions of teacher leaders on the issue.

The political dimension to public sector bargaining works to the advantage of public sector employees in several different ways. Although data are not available, it is likely that there is greater turnover in public than in private sector management. More importantly, private sector management tends to have a greater direct and personal stake in resisting unreasonable union demands. This is particularly apparent with respect to pension and retirement benefits. Public management frequently achieves bargaining agreements by excessively generous pension and retirement benefits. Such concessions may not require any tax increase during the tenure of the management officials responsible for the agreement. They can be heroes to the employees for having been so generous, and to the public for not raising taxes. Thus many a public official has saddled taxpayers with enormously expensive long-range commitments. Significantly, the tendency to "end load" agreements this way has become evident in local, state, and federal agreements. It is estimated that one-tenth of the revenues of New York State must be devoted to pension and retirement benefits for public employees. In New York City, the retirement benefits greatly exceed those available in the private sector, as they do in public jurisdictions generally. It is difficult to see the equity in requirement private sector employees to provide retirement benefits which greatly exceed their own, but that is the present situation.

Another crucial point is that public employers have less incentive than private ones to resist union demands. If private sector management makes a concession that impairs the long-range viability or profitability of the enterprise, that fact is reflected <u>immediately</u> in the value of the company. In other words, management cannot avoid

immediate accountability by agreement to excessive deferred benefits. Furthermore, management's personal stake in resisting union demands is typically greater in the private sector. Top management tends to have a direct economic stake in the financial condition of the enterprise. Private sector management is more likely to have a continuing personal economic stake in the long-range financial stability of the enterprise; public management is much less likely to have such a stake. And although these observations are subject to exceptions and qualifications, they reflect a basic truth about the differences between public and private sector employment relationships. Needless to say, they also reflect a significant advantage of public over private employment. This advantage exists independently of bargaining, but bargaining clearly escalates the advantage to the point where it is a major inequity of private sector employees.

The major disadvantage of public employees relates to revenue raising and ratification procedures. The private sector employer can make a deal without having to be concerned about public or political opposition. When the appropriate corporate executive signs off, the agreement is ratified. Ratification by a public agency can be more difficult, and the difficulties may serve as a brake on what management is willing to do. The public employer may not be willing to risk the political fallout from the higher taxes needed to provide justified increases in public employee compensation.

Nevertheless, even on this issue, the public employees have some advantages. The employer's financial situation is known to the union, as is the public employer's room for maneuver. The public employer is at a tactical disadvantage in that the relevant financial data are readily available to the public employee union. Indeed, it is not surprising to be confronted by teacher union representatives more knowledgeable about the district budget than are the administrators. My point is not to advocate secrecy in government, but merely to point out that public employees have an inherent advantage over private sector ones with respect to their information needs relating to the employer's ability to pay.

Similarly, public employees do not seem to have any obligation of loyalty to their employer. A teacher can say "We have the worst district in the nation. Pupils are not learning and the administration is a bunch of lousy bums." In the private sector, employees are under some obligation not to damage the employer. Farm workers can urge the public to boycott grapes, but they cannot legally allege that X's wine is a lousy product which nobody in his right mind would purchase. Again, I am not advocating a restriction on the right of public employees to criticize public officials and institutions. But there is no doubt that public employees enjoy legal rights to criticize their employers which exceed such rights in the private sector. Needless to say, this is a bargaining advantage to public employees, especially in view of the political dimension to public employee bargaining.

According to public sector unions, the most glaring inequity is the fact that in most states, strikes by public employees are prohibited. If we limit our analysis to the legal right to strike, and ignore the practical difficulties of enforcing penalties for illegal strikes by public employees, there appears to be an inequity. Nevertheless, this inequity is more technical than practical, and, at least in education, the typical legislative solution to it has been even more adverse to public management than would be the legalization of strikes.

First, it is essential to recognize that teacher strikes are not an economic weapon. If they are an economic weapon at all, they are a management one. The "loss of production" resulting from a teacher strike is hardly noticeable - who can say years or even months after the fact what difference was made by a few days of schooling, more or less? From the standpoint of putting economic pressure on the employer, the loss of the right to strike in education is no loss at all. On the other hand, because teacher strikes are political, not economic, weapons, not having the right to strike may even strengthen the political effectiveness of teachers. The public is not likely to be aware of the economic ineffectiveness of teacher strikes, while it may be sympathetic to the argument that something should be done to help employees who cannot strike.

As previously noted, the differences between public and private sector bargaining are not all favorable to public employees. In my opinion, however, most of them are, even though their practical importance varies from state to state. Clearly, the justification for public employee collective bargaining is much stronger in states like Mississippi, which have virtually no statutory benefits,

than in states like California, which have very substantial statutory benefits. Paradoxically, however, bargaining has emerged first and foremost in the states where it has the least justification and has yet to emerge in many states where its justification is comparatively greater. It must be emphasized, however, that most of the advantages of public sector employees are ineradicable, regardless of where they are located. Short of disenfranchising public employees, which is practically impossible, we cannot eliminate the additional leverage on the employer available to public employees through the political process. Similarly, the rights of public employees to due process are grounded in the federal constitution, and it is neither realistic nor practical to anticipate the elimination of these rights through the political process. If therefore, equity is to be achieved, it must be achieved by adjusting the representational rather than the constitutional rights of public employees. The representational rights constitute the area of flexibility within which adjustments can be made to compensate for the inherent advantages of public employment.

Because teachers don't have the right to strike, state legislation usually prescribes considerable time for bargaining and for impasse procedures. The upshot is that school management is forced to endure such protracted bargaining and impasse procedures that it often concedes more than it would in a strike settlement. After all, the longer management is at the table, the more it gives away. Even in the exceptional case where this is not true, the process consumes a great deal of management time and energy and resources. The price management pays to avoid fact-finding can be even greater than the price it pays to avoid a strike.

Legislatures and school officials alike ought to be concerned about the fact that too much, not too little time, is devoted to public employee bargaining. Instead of providing a minimum amount of time for bargaining, legislatures should consider a maximum. Teacher unions could still be amply protected against any lack of time due to inadequate management preparation; e.g., through the mechanism of unfair labor practices.

The emphasis on mediation and fact-finding has been very costly to the public for another reason which deserves more attention. This emphasis has been a significant causal factor in teacher persistence in unreasonable demands. A teacher union which had to strike, and thereby expose its members to the loss of income, instead of having the right to invoke fact-finding would find it more difficult to maintain unreasonable positions.

Let me give a concrete example. This past summer, I served on a negotiating team for a large California district. After five full days of bargaining without any agreements, the teachers invoked the impasse procedures under California law. A few of the teacher demands still on the table were as follows:

1. Complete teacher discretion as to hours of employment.
2. Unlimited teacher discretion whether to see parents and/or teachers outside the school day.
3. Teachers to have a veto over all aspects of teacher evaluation.
4. Teachers to negotiate the duties of their supervisors.
5. No teacher transfer without teacher consent.

In my opinion, the fact that the alternative was mediation and fact-finding, instead of a strike, greatly reinforced teacher persistence in these unreasonable demands. In fact, the very existence of the impasse procedures strengthened the teacher determination to concede as little as possible, lest they weaken their position in the impasse procedure. Mediation and fact-finding should be available only for a limited time and to parties who have substantially narrowed their differences. To make these procedures available to parties who can't agree on a single item is to encourage unrealistic and irresponsible bargaining. At any rate, in remedying a legal inequity whose practical importance is vastly overrated, the legislatures have enacted impasse procedures which are more damaging to effective management than the legalization of teacher strikes would be.

Assuming that the previous analysis is substantially correct, what of it? What policies or actions does it suggest; who should do what?

I am troubled by the foregoing analysis; I am troubled especially by the immense practical difficulties of doing anything constructive about it. Clearly, we cannot go back to the pre bargaining days. For better or for worse, we have institutionalized collective bargaining or something like it in most states. The personnel and resources available to teacher and other public employee unions virtually insure the continuation of collective bargaining in the public sector. Thus the political influence of public employee unions - the same factor that gives them an undue advantage in bargaining - is also a major deterrent to remedial action at the legislatve level.

Furthermore, it is probably useless for us to look to higher education for any help in this matter. Many institutions of higher education have departments which are supposed to study and analyze labor legislation. These departments operate under many labels, such as labor economics, labor and industrial relations, labor law, personnel administration, and so on. Whatever the label, it is clear that public management cannot look to them, especially the most prestigious ones, for help. The reason is that many of the professors in these departments moonlight as mediators, arbitrators, conciliators, and fact-finders. For this reason, they are not effective critics of labor legislation generally, and especially of legislation which encourages and promotes the use of extended impasse procedures. On the contrary, they frequently promote such legislation, finding no problem whatever in finding it in the public interest. I do not allege that the relationship is necessarily conscious and deliberate; my point is, however, that the philosophy that what's good for General Motors is good for the country lives in these departments, as indeed it does in higher education generally.

Whatever may be the case outside schools of education, professors and departments of educational administration have overwhelmingly failed to assist school management to cope with collective bargaining at any level or in any dimension. It is, of course, no crime or even any big deal not to be knowledgeable about collective bargaining; on the other hand, for a group allegedly devoting their working days to the improvement to school management, the almost total irrelevance of professors

of educational administration raises some hard questions about the relationships between these departments and the enterprise to which they are allegedly devoted.

At any rate, since I have no solutions to the problems raised in this presentation let me at least suggest a direction if not a solution which might be considered. Should AASA, perhaps in conjunction with other public management organizations, try to exercise the leadership needed by public management generally as well as school management in this troublesome area? The question is not asked rhetorically, nor with the assumption that one must lead or do nothing. Leadership involves program, budget, personnel - everything that affects a major national organization. I do not urge you to try, but ask only that you consider seriously the need, and the complex organizational implications of an affirmative response.